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No. 82-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREAT LAKES DREDGE AND DOCK COMPANY,
A Corporation,

Petitioner,

vs.

GERMAN EBANKS, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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REASONS FOR DENYING THE WRIT

Position of Respondents Self, Payment, Laurendine and Bassham is that the Petition for Writ of Certiorari should be denied. Reasons advanced for the Writ do not demonstrate any conflict between federal circuits or other courts and do not raise any meritorious constitutional issues. Furthermore, the decision below was correct under *Edmonds* v *Compagnie Generale Transatlantique,* 443 U.S. 256, 99 S. Ct. 2753, 61 L.Ed. 2d 521 (1979).

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case except for Petitioner's interpretation of the special jury verdicts, preferring instead to refer the court to the actual verdict form reproduced in full in the Opinion of the Court of Appeals for the Eleventh Circuit (page A-5 of the Petition for Writ of Certiorari).

ARGUMENT

I

CONTRIBUTION AWAITED THIRD-PARTY PROCEEDINGS

A comparison of the Petition with the opinion of the court below will disclose that the questions presented by Petitioner do not pertain to the grounds of the appellate court's decision.

The appellate court held that it was reversible error to submit to the jury questions involving whether, and to what degree, a stranger to the cause tried could be held at fault. Petitioners contend that this somehow abrogated the maritime rule of comparative fault and apportionment of damages. But as the appellate court's opinion shows (Petition p.A-14) apportionment of damages awaited later trial of third-party proceedings commenced by the defendant tortfeasor against the non-defendant tortfeasor. It was thus not a matter of abrogation; it was a matter of timing.

Petitioners also contend that the Writ should be granted because of "widely divergent" lower court rulings dealing with the allocation of damages between settling and nonsettling joint tortfeasor defendants. While one could quarrel with Petitioner's characterization of "widely divergent" results, it is unnecessary to do so. This case, as the Court of Appeals took pains to point out, did not involve *defendants*. The trial of this case involved only one defendant, Petitioner herein. This Court in *Edmonds* v *Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) reaffirmed the age-

old common-law and admiralty rule that a plaintiff may "sue . . . all the wrongdoers, or any of them, at his election; and . . . if he did not contribute to the disaster, he is entitled to a judgment in either case for the full amount of his loss." *The Atlas* 93 U.S. 302, 23 L.Ed. 863 (1876); *Edmonds*, supra, at 260.

This case did not involve the question Petitioner raises in Reason No. 1 for the granting of the Writ. Unlike *Leger* v *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979) and the other cases cited by Petitioner, the other tortfeasor was not a party to the trial of *this* lawsuit. Allocation of damages, if any, between the trial defendant and the other tortfeasor awaited trial of severed third-party proceedings.

The Court of Appeals merely held that comparative fault cannot be allocated by the jury verdict form to a stranger to the lawsuit. The vitality of the principle of comparative fault and apportionment of damages remained for application in the third-party proceedings to take place later between the two tortfeasors. Cf. *Lockheed Aircraft Corporation* v *U.S.*, U.S. , 51 Law Week 4206 (Feb. 23, 1983).

II

DOUBLE JEOPARDY INAPPLICABLE

Petitioner's attempt to create a constitutional question out of a retrial on punitive damages is equally unavailing. Overlooked entirely is that the Fifth Amendment's "double jeopardy" clause applies only to criminal, not civil, actions. *Rex Trailer Co.* v *U.S.*, 350 U.S. 148, 76 S.Ct. 219, 100 L.Ed. 149 (1956); *U.S. ex rel Marcus* v *Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943).

Significantly, Petitioner cites no authority holding the principle against double jeopardy applicable in civil punitive damage cases. Dean Prosser's rather obscure remark, Prosser, Law of Torts, § 2, p. 11 (1975), characterized by Petitioner as "Dean Prosser's lament" is, at best, authority to the contrary

of the proposition petitioner now advances. Dean Prosser was merely making an observation as to the state of the law. A bit more reading of his treatise indicates that he was simply instructing that rules against double jeopardy and self incrimination, for example, do not apply in punitive damaged cases. He was neither lamenting this state of affairs nor advocating to the contrary.

That exemplary damages may contain an element of punishment, i.e., anti-trust treble damages, cannot convert a civil money damage action into one putting "life and limb" in jeopardy. Such was the ruling in *U.S. ex rel Marcus* v *Hess, supra,* where this Court held (pp. 550-551) that imposition of more than actual damages does not cause the remedy to lose its "civil" quality nor implicate double jeopardy considerations.

The jury never reached the question of whether plaintiffs were entitled to punitive damages (see special verdict question 8, page A-5, Petition for Writ of Certiorari). And petitioner concedes it never raised this issue in the Court of Appeals (Petition p. 12). So, petitioner's "double jeopardy" contention is not only void of merit, but also neither was presented nor decided in the court below.

CONCLUSION

The case does not warrant this Court's review and the Writ should be denied.

Respectfully submitted,

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